

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:

WAVEDIVISION HOLDINGS, LLC  
ASTOUND BROADBAND, LLC

Petitioners,

v.

COMCAST SPORTSCHANNEL PACIFIC  
ASSOCIATES  
COMCAST SPORTSNET CALIFORNIA, LLC  
COMCAST SPORTSNET NORTHWEST, LLC  
NBCUNIVERSAL MEDIA, LLC

Respondent Programmers

MB Docket No. 17-361

File No. CSR-8948-Z

**TO THE COMMISSION:**

**REPLY TO OPPOSITION OF  
NBCUNIVERSAL MEDIA, LLC**

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## SUMMARY

Wave filed a straightforward Petition, asking the Commission to declare the deliberate conduct of three Comcast-owned regional sports networks, which had the effect of withholding must-have regional sports programming from the largest cable competitor to Comcast Cable on the West Coast unless Wave agreed to pay a punitive ransom totaling nearly \$3.5 million, violated the restrictions of 47 U.S.C. §548(b).<sup>1</sup> The Comcast RSNs do not deny their conduct and barely attempt to defend it; instead they primarily rely on procedural defenses.<sup>2</sup>

The Comcast RSNs incorrectly assert that Wave's Petition must be treated as an untimely filed program access complaint. This assertion underscores the importance of addressing Wave's Petition on its merits. The Comcast RSNs, for their own benefit as well as all of their sister Comcast Cable-affiliated programming networks, seek a Commission declaration that any conduct by a cable-affiliated satellite programming service provider, no matter how egregious, no matter how clearly it violates statutory prohibitions, if not complained about within one year of signing a multi-year agreement, cannot be restrained. Commission inaction on the merits would green-light egregious and illegal conduct by cable-affiliated programmers – provided they wait for at least a year after signing their programming deals. That said, the Comcast RSNs are wrong as a matter of law – there simply is no time bar on bringing a petition pursuant to Section 548(b).

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<sup>1</sup> See *WaveDivision Holdings, LLC and Astound Broadband, LLC, Petitioners v. Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC, and Comcast SportsNet Northwest, LLC, Respondents*, Public Notice, MB Docket No. 17-361 (Dec. 22, 2017); *WaveDivision Holdings, LLC and Astound Broadband, LLC, Petitioners v. Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC, and Comcast SportsNet Northwest, LLC, and NBCUniversal Media, LLC, Respondents*, Petition for Declaratory Ruling (Dec. 19, 2017) ("Petition"). Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC, and Comcast SportsNet Northwest, LLC are referred to as the "Comcast RSNs."

<sup>2</sup> See *Opposition of NBCUniversal Media, LLC (on behalf of the Comcast RSNs) to the Petition of WaveDivision Holdings, LLC and Astound Broadband, LLC for Declaratory Ruling and Request for Waiver* (January 22, 2018) ("Opposition").

The Opposition's suggestion that Wave's Petition was rendered moot by the recent acquisition of Wave's ultimate parent company, which eliminated the need for Wave to have stand-alone agreements, is a distraction built on a fiction. Wave did not need the Commission to rule on its Petition in order to protect its renewal rights as Wave had available, and on January 16, 2018 invoked, the commercial arbitration remedy pursuant to the Comcast/NBCU Consent Decree.<sup>3</sup> More importantly, the Comcast RSNs' act of forcing the punitive payment of a total of nearly \$3.5 million by threatening the shut off of must-have programming is not mooted by any renewal or new agreement.<sup>4</sup> Those payments were very real, wrongfully extracted and should be returned.

Looking to rationalize undercutting the fundamental construct of their agreements with Wave, the Comcast RSNs attempt to defend their actions by claiming that the "Commission made me do it." Their defense is not only disingenuous, but also lays bare the falsity of the Comcast RSNs' sole attempt to justify their actions. The Comcast RSNs have affirmatively sought out distribution by OVDs to offset losses from cable cord-cutters and cord-shavers – and they have succeeded. The Comcast RSNs now herald wider distribution of their services by OVDs as somehow making them altruistic champions of competition.<sup>5</sup> Ironically, boasting of this success destroys the integrity of their economic justifications for strict enforcement of minimum distribution requirements in cable programming agreements. The integrity of the economic analysis proffered by the Comcast RSNs to justify such strict enforcement against Wave is undermined by the omission of new and offsetting revenues from OVD subscriptions paid for by subscribers to Wave's broadband service. In fact, extracting from Wave fees for

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<sup>3</sup> Declaration of James A. Penney ("Penney Declaration") at ¶ 2 (attached as Attachment 1).

<sup>4</sup> Petition at ¶¶ 37, 43 and 50.

<sup>5</sup> Opposition at 12 (declaring OVD distribution as "*pro-competitive conduct*").

phantom subscribers to the Comcast RSNs' services (those who only purchase broadcast basic cable service) while simultaneously admitting that many such phantom subscribers are purchasing the Comcast RSNs' services from OVDs, the Comcast RSNs admit the fatal flaw – collecting the same fee twice for the same Wave subscriber.

The conduct of the Comcast RSNs resulted in a financial windfall and wrongfully increased the cost of their services for the principal West Coast competitor to Comcast Cable in violation of 47 U.S.C. § 548(b). The manner in which the Comcast RSNs extracted the windfall -- threatening to withhold must-have programming with only four days' notice unless Wave rearranged its cable service offerings in a way to make them competitively unviable --violated 47 U.S.C. § 548(b).

The Comcast RSNs as well as all of the other Comcast-affiliated satellite programming providers would love nothing more than to have the Commission turn a blind eye to their conduct and declare that multichannel video programming distributors simply have no recourse and the Commission procedurally has no mechanism to enforce violations of 47 U.S.C. § 548(b).

The need for FCC review is only heightened by the fact that the conduct described in Wave's Petition played out in the context of renewal discussions. Wave had the safety net of the commercial arbitration remedy to level-set issues assuming it could get to the expiration of the agreements, which it did invoke. The sunset of that remedy, however, makes Commission action even more imperative because that safety net is now gone for those who follow.

The Commission has a clear mandate from Congress and the time is right to fire a warning shot – to establish the precedent – that the Commission will not allow such egregious conduct to flourish unchecked either during the life of an agreement or in the shadow of renewal.

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**I. THE COMCAST RSNS IGNORE THE VALIDITY OF THE RESTRICTIONS IMPOSED BY 47 U.S.C. §548(b) AND SEEK TO PROCEDURALLY PRECLUDE ACCESS TO ENFORCEMENT.**

The Comcast RSNS would like for the Commission to ignore the existence of the prohibitions contained in 47 U.S.C. §548(b):

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming to subscribers or consumers.

Congress clearly describes prohibited conduct – regardless of when it occurs in the life cycle of a programming agreement. As detailed in its Petition, Congress charged the Commission with establishing and implementing a minimum set of substantive and procedural regulations covering certain types of conduct<sup>6</sup> that the Commission must and did address in its regulations.<sup>7</sup> This construction in no way limits the broad scope of conduct prohibited by 47 U.S.C. § 548(b). In fact, the Commission focused its regulations and complaint process on actions based on terms and conditions that violated the prohibitions of 47 U.S.C. § 548(b) at the time of signing, not violative conduct that occurred after signing. However, to ensure no prohibited conduct slips through the cracks, Congress gave a statutory right for any MVPD to file a complaint arising from conduct described in 47 U.S.C. § 548(b), regardless of when such conduct takes place.

The Comcast RSNS' repeated claims that Wave's Petition was an untimely program access complaint does not make it true. Wave's Petition was always and solely remains a Petition to seek redress for conduct violating 47 U.S.C. §548(b). Wave's only reference to the program

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<sup>6</sup> 47 U.S.C. § 548(c)(2) and (f).

<sup>7</sup> See, e.g., 47 C.F.R § 76.1002.

access complaint process was to defer to the Commission's preference should it desire to address this case of first impression under the existing structure of that process.<sup>8</sup>

The Commission has before it a Petition seeking to have the conduct detailed therein declared violative of 47 U.S.C. §548(b). The narrow precedent established would make relief available only where actions by a cable-affiliated satellite programming service renders contractual compliance by an MVPD that competes with the affiliated cable operator impossible. In fact, by addressing Wave's Petition, the Commission will signal to all cable-affiliated programmers to avoid engaging in conduct that attempts to cripple competitors to their affiliated cable operations, thus reducing the need for future complaints.

## **II. THE COMCAST RSNs DO NOT DENY THEIR CONDUCT, RATHER, THEY PROCLAIM IT AS ALTRUSTIC AND PROFFER A FATALLY FLAWED ECONOMIC JUSTIFICATION FOR THEIR ACTIONS.**

Two essential elements lie at the heart of Wave's Petition: (1) the Comcast RSNs' conduct created market conditions in which meeting distribution minimums became impossible; and (2) the Comcast RSNs used those changed circumstances to attempt to withhold must-have programming and thereby impair Wave's ability to compete with Comcast Cable.

The Comcast RSNs blame the Commission's mandate to make their programming available to OVDs for the increase in OVD availability of their services.<sup>9</sup> Undeniably, the Comcast RSNs have made their services widely available to numerous OVDs<sup>10</sup> and the Comcast RSNs now offer services directly to consumers, bypassing all distributors.<sup>11</sup> In fact,

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<sup>8</sup> Petition at ¶24 (acknowledging the necessity in such a case of the waiver of the one-year time limit for bringing an action).

<sup>9</sup> Opposition at 11

<sup>10</sup> Petition at fn 44.

<sup>11</sup> *Id.*



the Comcast RSNs take credit that by making their services widely available to OVDs, they have “made Wave’s broadband services more attractive.”<sup>12</sup> But therein lie the problems.

By making Wave’s broadband services more attractive, they have made large bundled tiers of cable service less attractive – triggering a migration from cable operators to OVDs for services such as those offered by the Comcast RSNs. Because there is still no ubiquitous OVD substitute for local broadcast television, cable subscribers for those basic broadcast services have remained with Wave. It was the very conduct of the Comcast RSNs that upset the underlying fundamentals of their agreements with Wave.<sup>13</sup>

The financial examples proffered by the Comcast RSNs to justify the need to aggressively enforce minimum distribution percentages conveniently omit the fact that the loss of expanded basic subscribers to cord-shaving results in part in increased revenues from OVDs.<sup>14</sup> To the extent a Wave cable subscriber shifts her purchase of the Comcast RSN services from Wave’s expanded tier to an OVD received via Wave’s broadband Internet access service, Comcast is no worse off.

### **III. THE METHODS USED TO ENFORCE MINIMUM DISTRIBUTION REQUIREMENTS VIOLATED 47 U.S.C. § 548(b) AND THE COMCAST RSNs MAKE LITTLE EFFORT TO JUSTIFY THEM.**

The Comcast RSNs assert that their conduct simply involved actions to enforce compliance with “market-based terms.” The terms are in fact not market-based, nor were the enforcement actions simply aimed at rendering compliance.

The Opposition inaccurately claims that the Comcast RSNs’ minimum distribution requirements based on a percentage of total subscribers (rather than excluding subscribers who

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<sup>12</sup> Opposition at 13 (“If anything, therefore, the licensing of NBCUniversal’s programming to OVDs has made Wave’s broadband services more attractive.”)

<sup>13</sup> Petition at ¶¶ 37, 43 and 50.

<sup>14</sup> Petition at ¶10, fn 23.

purchase only broadcast basic) is industry standard. Outside of Comcast-affiliated programmers, the norm today is to exclude broadcast basic-only subscribers from minimum distribution percentage calculations as documented in Wave's Petition.<sup>15</sup> As to actual knowledge of what is in non-Comcast-affiliated programming agreements, Wave's knowledge is much more current.<sup>16</sup> Moreover, even the example provided to the Commission refers to "capped broadcast basic exclusions" as not being an off-market provision. In the instant case, there were no broadcast basic exclusions – let alone capped ones.<sup>17</sup>

The Comcast RSNs and Wave recognize that continued compliance with minimum distribution percentages based on total subscribers was no longer attainable given the migration of many of Wave's expanded tier cable subscribers to OVD providers. While Wave understood that the parties would craft an arrangement to address the issue on a going forward basis as part of a negotiation of long-term renewals, Wave was shocked that without engaging in meaningful negotiations, the Comcast RSNs served Wave with a demand that it either include the services in its broadcast basic tier, a move they admitted was an impossibility for Wave, or the services would go dark four days later. It was from this demand that the Comcast RSNs were able to extract the punitive payment of nearly \$3.5 million from Wave – payments that would keep the services on for fewer than six more months.

This goes beyond mere enforcement of contract rights. This was a threat to withhold must-have regional sports programming from the largest competitor to its affiliated cable operator, Comcast Cable, unless Wave agreed to pay amounts that materially increased its cost

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<sup>15</sup> Petition at ¶11.

<sup>16</sup> Petition at Attachment 1, ¶4, Declaration of James A. Penney (Mr. Penney's experience with the agreements of other programming providers is current while Mr. Budill's Declaration reflects no broad exposure to the actual agreements of non-Comcast-affiliated programmers since 2012).

<sup>17</sup> *Id.* at ¶ 3.

of such programming.<sup>18</sup> This is the epitome of an unfair method of competition or unfair act or practice, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming to subscribers or consumers.<sup>19</sup>

The Comcast RSNs allege that none of their conduct was “designed to benefit Comcast Cable.”<sup>20</sup> This is yet another diversion. Intent is not a required element of a 47 U.S.C. § 548(b) violation. The statute prohibits any actions that have the purpose *or the effect* of hindering the ability of an MVPD to provide programming to its subscribers. In this case, it is the effect of the conduct -- by materially raising the cost of the programming by charging for phantom subscribers up to the required distribution minimums and then charging punitive amounts even above that -- which is exactly the type of conduct Congress outlawed.

#### **IV. WAVE’S PETITION IS NOT MOOT.**

It is undisputed that Wave paid the Comcast RSNs nearly \$3.5 million to keep the services from going dark.<sup>21</sup> The conduct of the Comcast RSNs to extract these payments and the effect of the payments themselves violate 47 U.S.C. 548(b). Today the Comcast RSNs hold that money. It should be returned. That claim is not moot.

The premise that Wave’s Petition was filed to gain negotiating leverage in a renewal is a necessary fiction to support the Comcast RSNs erroneous mootness argument. The subsequent acquisition and inclusion of Wave’s systems into another preexisting agreement does not result in Wave having its money returned. There is nothing moot about Wave’s Petition.

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<sup>18</sup> As measured on a per subscriber basis of those subscribers actually paying to receive the service.

<sup>19</sup> 47 U.S.C. § 548(b).

<sup>20</sup> Opposition, Exhibit A, Declaration of E. McRae Budill at 17.

<sup>21</sup> Petition at ¶ 49.

## **CONCLUSION**

Wave's Petition shines light on the ugly reality that cable operators, especially ones that dare compete with Comcast Cable, face from Comcast-affiliated programmers. The Comcast RSNs would prefer the Commission not review their conduct, but rather dismiss the Petition on sterile procedural grounds. But there is no procedural basis for dismissal of Wave's Petition. Wave respectfully requests that the Commission expeditiously evaluate and decide the issues set forth in its Petition.

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Respectfully submitted,

**WAVEDIVISION HOLDINGS, LLC**  
**ASTOUND BROADBAND, LLC**

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Date: February 1, 2018

## VERIFICATION

I have read and reviewed the foregoing Reply to Opposition and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose. I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on February 1, 2018.

A handwritten signature in dark ink, appearing to read 'Eric E. Breisach', written over a horizontal line.

Eric E. Breisach  
Breisach Cordell PLLC  
Attorney for WaveDivision Holdings, LLC and  
Astound Broadband, LLC

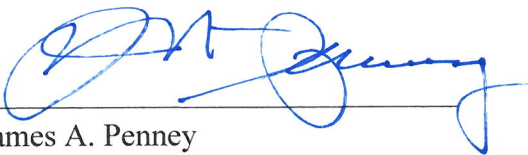
**ATTACHMENT 1**

**DECLARATION OF JAMES A. PENNEY**

## DECLARATION OF JAMES A. PENNEY

1. I am the General Counsel for WaveDivision Holdings, LLC and its wholly-owned subsidiary, Astound Broadband, LLC.
2. Having failed to reach mutually agreeable renewal agreements with the Comcast RSNs, on January 16, 2018, Wave served notice on each of its intent to invoke the commercial arbitration remedy authorized pursuant to the Comcast/NBCUniversal Consent Decree.

I declare that under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 1, 2018.



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James A. Penney



## CERTIFICATE OF SERVICE

I, Eric E. Breisach, of Breisach Cordell PLLC, certify that on this 1<sup>st</sup> day of February, 2018, I caused the foregoing Reply to Opposition to be served via USPS Priority Mail, postage prepaid, on each of the following:

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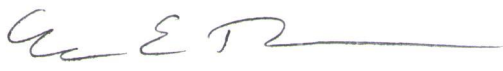
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